Petition

81-5748

IN THE SUPREME COURT OF THE UNITED STATES

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October Term, 1981

AMALIA MORGADO

Petitioner

-vs-

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO.

AMALIA MORGADO

Petitioner

-vs-

THE UNITED STATES OF AMERICA

Respondent

Amalia Morgado petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

QUESTIONS PRESENTED

1. WHETHER THE DENIAL OF THE MOTION FOR SEVERANCE FILED BY AMALIA MORGADO VIOLATED HER RIGHTS TO DUE PROCESS UNDER THE FIFTH AMENDMENT?

2. WHETHER PROVISIONS OF THE RICO STATUTE ARE UNCONSTITUTIONALLY VAGUE AS WRITTEN AND AS APPLIED TO AMALIA MORGADO IN THIS CASE?

3. ADOPTION OF QUESTIONS PRESENTED BY THE PETITIONS FOR CERTIORARI FILED BY THE OTHER DEFENDANTS NAMED IN THE INDICTMENT.

LIST OF PARTIES

Amalia Morgado

Rosario Palermo

William H. Brown

John D. Fisher

Robert D. Young

Joseph Macaluso

Frank Scionti

Sam C. Martino

Paul Guarino

Jimmy Farina

Berton B. Chase

Rolando Gonzalez Rodriguez

Joseph Russello

Joseph D. Lazzara

United States of America

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at United States v. Martino, 648 F.2d 367 (5th Cir. 1981).

JURISDICTION

The opinion of the lower Court was filed on June 19, 1981. (Appendix A) The Court of Appeals denied Amalia Morgado's Motion for Rehearing on September 17, 1981. (Appendix B)

The United State Supreme Court has jurisdiction to review the judgment of the Court of Appeals by a Writ of Certiorari pursuant to Section 1254(1) of Title 28, United States Code, which provides as follows:

> § 1254. Courts of Appeals; certiorari; appeal; certified questions
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

18 U.S.C. § 1341

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1961.

§ 1961. Definitions

As used in this chapter--

(1) "Racketeering activity" means (A) any act or

threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports briberg), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the ct indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1342 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigation), section 1511 (relating to obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1951 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C)

any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation

of the law of the United States, a State or political subdivision thereof, or which is unenforceable under the State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State of Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General

to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962.

§ 1962. Prohibited activities

(a) It shall be unlawful any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of Section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in

the aggregate to one percent of the outstanding securities of any one class, and do not confer either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Federal Rules of Criminal Procedure, Rule 14.

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for

severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

STATEMENT OF THE CASE

Petitioner, Amalia Morgado, was named as a defendant in an indictment returned by a Grand Jury on June 8, 1977, in Tampa, Florida, in the Middle District of Florida. The indictment was eighty-three pages (83) in length, and contained thirty-five (35) separate counts against 23 individuals. Amalia Morgado was named as a defendant in seven (7) of those counts.

In Count One of the Indictment Amalia Morgado, along with twenty-two other individuals, was charged with conspiring to conduct and to participate in the conduct of an enterprise through a pattern of racketeering activity [18 U.S.C. § 1962(d)]. Amalia Morgado, along with twenty-one other individuals, was charged in Count Two of the Indictment with conducting and participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity [18 U.S.C. § 1962(c)].

The remaining five counts of the indictment in which Amalia Morgado was involved charged her with violations of the mail fraud statute [18 U.S.C. § 1341]. Those were Counts Eleven, Twelve and Thirteen, arising out of a fire at 3006 Nebraska

Avenue, in Tampa; and Counts Twenty-One and Twenty-Two, arising out of a fire at 3310 Vasconia Avenue, in Tampa.

After a trial by jury, Amalia Morgado was acquitted as to Counts Eleven, Twelve and Thirteen. She was convicted in Counts One, Two, Twenty-One and Twenty-Two. The Trial Court adjudged Amalia Morgado guilty as to Counts One, Two, Twenty-One and Twenty-Two. She was sentenced to nine years of imprisonment as to both Counts One and Two, and five years of imprisonment as to both Counts Twenty-One and Twenty-Two. The sentences were ordered to be served concurrently. The jurisdiction of the Trial Court was predicated upon Section 3231, Title 18, United States Code.

The indictment charged that twenty-two separate parcels of real property and one automobile were the subject of arson attempts over a period of time of approximately four years from and after September of 1972. Of those twenty-two pieces of real property, Amalia Morgado was accused of being involved in the arson of only two. Of the two arsons in which she was accused of participating insofar as the mail fraud counts were concerned, she was acquitted of one (3006 Nebraska Avenue).

Although 23 individuals were initially charged in the indictment, three of those defendants pleaded guilty prior to the trial and testified on behalf of the government. Of the twenty who went to trial, sixteen were convicted of one or more counts of the indictment. Of the sixteen convicted, one (Berton Chase) had his conviction overturned on appeal, and two died prior to the determination of the appeal (Holt and Lostracco).

The facts concerning the two arson attempts which allegedly involved Amalia Morgado are summarized below in the light most favorable to the government:

3006 N. Nebraska Avenue

Willie Noriega purchased a piece of improved real property located at 3006 N. Nebraska Avenue in Tampa from a Miss Cannon on October 23, 1973. (Vol. 49, pages 66-68). Noriega acquired the property in his own name with the intent of insuring the dwelling and then burning it in order to recover the insurance proceeds. (Vol. 49, pages 65-66). Noriega borrowed $7,000 from the Ybor Loan Company in order to purchase the house for $6,000. Later Noriega changed his mind and instead sold the house to Mr. Joseph Macaluso for $14,000. Mr. Macaluso borrowed $6,000 from Amalia Morgado, his former sister-in-law, in order to buy the property. (Vol. 49, page 78). Although Amalia Morgado owned no interest in the property, Noriega testified that she was aware of his plan to burn the house because of a conversation he had with her prior to the decision to sell the house to Joseph Macaluso. (Vol. 49, page 78).

Subsequent to the purchase of the property by Joseph Macaluso, Noriega assisted him in obtaining insurance on the house. Although Amalia Morgado was not accused of assisting in the obtaining of insurance on that house, Noriega testified that she was aware of Joseph Macaluso's desire to obtain insurance. (Vol. 49, page 87). Noriega, allegedly assisted by Paul Guarino and Joe Gomez, set fire to the house at 3006 N. Nebraska in February of 1974. Amalia Morgado did not participate in the arson, although again Noriega testified that she knew what day the fire was to be started. (Vol. 49, page 92).

After the fire, checks were issued to Joseph Macaluso, the Ybor Loan Company and a Mr. Spoto in payment for the loss sustained. Sam Martino, owner of the Ybor Loan Company, and Joseph Macaluso presented the checks for payment at the bank.

(Vol. 49, pages 95-96). Joseph Carter was paid for his services in adjusting the loss from this fire, but he was not paid that money in the presence of Amalia Morgado. (Vol. 49, pages 96-97).

Prior to the fire at that address Joseph Carter, an insurance adjuster, allegedly was contacted by Noriega to review the insurance policy that had been obtained on that house. He met with Amalia Morgado, Joseph Macaluso, and Noriega concerning that subject matter, and advised Joseph Macaluso that the property was sufficiently insured. Carter testified that Amalia Morgado told him that they were planning to burn the house in order to obtain the insurance proceeds. (Vol. 56, pages 26-27). Carter adjusted the loss after the fire, and concluded that it was not a total loss. He testified that Amalia Morgado attempted to get him to change his mind based on the argument that the building could not be repaired. He refused to do so. (Vol. 56, page 29).

A statement of loss concerning this fire was prepared by Carter and Joseph Macaluso, and that statement of loss was mailed to Sentry Indemnity Insurance Company by Carter. (Vol. 56, pages 30-31). The settlement checks for payment of the loss were made payable to Joseph Macaluso, the Ybor Loan Company, and Mr. and Mrs. Spoto. They were received by Joseph Carter through the mail and turned over to Noriega. These transactions formed the basis of the charges contained in Counts Eleven, Twelve and Thirteen in the Indictment. Amalia Morgado, Sam Martino, Paul Guarino and Joseph Macaluso were named in those counts. Amalia Morgado, Sam Martino and Paul Guarino were acquitted of those charges by the jury.

<u>3310 Vasconia</u>

Carrie I. Holt, mother of the defendant John Holt, owned a house located at 3310 Vasconia Avenue in Tampa. Mrs. Holt had the property insured by Safeco Insurance Company when she owned it. (Third Supp. Record, Vol. 2, pages 46-48). Mrs. Holt transferred ownership of that property to John Alan Holt sometime prior to July 31, 1974. Mr. Holt knew Amalia Morgado and her cousin, Maria (Diamond) Sanchez, because he attended high school with Mrs. Morgado's son.

After John Holt acquired ownership of the property from his mother he met with an insurance agent by the name of James Bransford. Mr. Bransford suggested increasing the limits on the policy because the cost of replacement had increased. The notification of change in ownership, which prompted the meeting with John Holt, came from the First Federal Savings & Loan Association of Tampa. (Third Supp. Record, Vol. 2, pages 47-49). John Holt met Maria Sanchez at Amalia Morgado's house sometime during the summer of 1974. He approached her for advice on insurance for the Vasconia house because Mrs. Sanchez had previously worked for an insurance company, and John Holt knew this. A phone call was placed by Maria Sanchez to Christina Bush, an employee of O. H. Carter Company (an insurance agency), in order to assist John Holt get the information he desired. Amalia Morgado was not in the room at the time this call occurred and did not participate in the call. (Third Supp. Record, Vol. 4, pages 1-9 and pages 12-13).

Mrs. Sanchez continued to assist John Holt after he decided to change insurance companies. Christina Bush obtained a quote for him at the request of Mrs. Sanchez, and an insurance application was completed by John Holt for coverage under Fireman's Fund Insurance Company. Although Miss Bush requested

John Holt to execute and return a form authorizing the cancellation of the Safeco insurance policy, that form was not returned prior to the fire on August 3, 1974. (Third Supp. Record, Vol. 4, pages 29-30).

Noriega testified that he agreed to burn the house on Vasconia after being approached by Amalia Morgado. He said that his payment was to be $2,000, one-half before the fire and one-half after it. The first attempt to burn the house was unsuccessful, and Noriega testified that he tried it again at the request of Amalia Morgado and John Holt. (Vol. 49, pages 147-150). Noriega did not know John Holt prior to the fire, and he admitted having no knowledge concerning the insurance coverage on the property. His payment for the arson, by his own testimony, had nothing to do with any insurance claim or payment, and he did not participate in the preparation or filing of such a claim. (Vol. 49, pages 147, 149 and 150-51).

Although Counts Twenty-One and Twenty-Two alleged that Joseph Macaluso, John Holt and Amalia Morgado had committed mail fraud in connection with the submission of false proofs of claim concerning this fire, Willie Noriega knew nothing about that allegation. The sole testimony concerning the preparation and submission of the proofs of loss came from John Holt's attorney, Gasper Ficarotta. He identified the cover letter prepared at his direction which accompanied the proof of loss submitted to Fireman's Fund, but he could not testify that the letter had been mailed as opposed to being hand-delivered. Mr. Ficarotta never mentioned the name of Amalia Morgado in his testimony, and was not asked to testify at all concerning the proof of loss submitted to Safeco Insurance Company. (Vol. 65, pages H-32 to H-36).

Joseph Macaluso received a judgment of acquittal on these counts at the close of the government's case. John Alan Holt and Amalia Morgado were found guilty as to each of Counts Twenty-One and Twenty-Two.

REASONS FOR GRANTING THE WRIT

This Court should issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in order to review the decision which it reached in United States v. Martino, 648 F.2d 367 (5th Cir. 1981). The decision in this case by the Court of Appeals, with respect to the denial of the motion for severance, conflicts with the case of Kotteakos v. United States, 328 U.S. 750 (1946). The decision as to the constitutionality of the provisions of the RICO statute involved in this indictment addresses an important Federal question which should be decided by this Court.

ARGUMENT

1.

WHETHER THE DENIAL OF THE MOTION FOR SEVERANCE FILED BY AMALIA MORGADO VIOLATED HER RIGHTS TO DUE PROCESS UNDER THE FIFTH AMENDMENT

Amalia Morgado, through her court-appointed counsel, filed a motion for severance and a separate trial in this case pursuant to Rule 14 of the Federal Rules of Criminal Procedure on July 20, 1977. (Vol. 8, Item 131). This motion was denied by the Trial Court on September 7, 1977. (Vol. 6, Item 271, page 7). The denial of that motion for severance and a separate trial denied Amalia Morgado her rights to Due Process of Law under the provisions of the Fifth Amendment to the United States

Constitution. The denial of that motion was an abuse of the discretion reposed in the Trial Court under the provisions of Rule 14 of the Federal Rules of Criminal Procedure.

The indictment, throughout its 83 pages, referred to 22 separate attempted or accomplished arson incidents. The substantive offenses of mail fraud were set forth in 33 separate counts, and the RICO violations were contained in two other counts. The indictment named 23 individuals as defendants, and at the trial 20 separate individuals were tried before a jury. The joint trial lasted approximately three months, and consumed more than 11,000 pages of testimony derived from more than 200 witnesses.

At the time the trial began Amalia Morgado was implicated in only two of the 22 separate alleged incidents of arson. The jury acquitted her of the mail fraud charges based upon the alleged arson at 3006 N. Nebraska (Counts Eleven, Twelve and Thirteen). The vast majority of the witnesses called to testify in this trial did not even mention the name of Amalia Morgado. In fact, the one witness to the alleged mailing of the proofs of loss prepared after the Vasconia fire did not even mention the name of Amalia Morgado. Witness after witness was paraded before the jury in order to testify concerning fires which did not involve Amalia Morgado which were the basis of counts which did not name Amalia Morgado. Approximately six of the exhibits offered by the government, out of the five boxes of exhibits included in the record on appeal, related in any way to the charges made against Amalia Morgado.

The oral testimony offered by the government against Amalia Morgado would not have consumed more than a day or two in a typical tr l in Federal Court, yet she was required to

participate in a trial which spanned three months. The volume of testimony offered during that trial prevented the jury from considering the case against Amalia Morgado separately, and resulted in a decision based upon a factual record which was needlessly complex, confusing and convoluted. That a separate trial was required under these facts is obvious. That a separate trial was possible without any prejudice to the government was demonstrated by the paucity of evidence concerning Amalia Morgado elicited from the multitude of witnesses called to the stand by the government.

The facts in Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946), in which the convictions of the defendants were reversed, cannot be distinguished. The Court of Appeals recognized the prejudice to the defendants which is involved in joint trials of this type:

> We are keenly aware that joint trials, especially those involving numerous defendants and multiple charges, carry substantial risks of manifest unfairness. We do not encourage trials en masse.

648 F.2d at 385. Despite the fact that the "manifest unfairness" of a joint trial was demonstrated by the record in this case, the Court of Appeals refused to reverse the convictions on this ground. The Court of Appeals refused to follow the decision of this Court in Kotteakos, supra, and instead affirmed the convictions based upon its assessment that the Trial Judge had handled his "formidable task" with great skill and judicial professionalism. 648 F.2d at 386. Amalia Morgado did not assert in her appeal, and does not contend in this Petition, that the Trial Court did not attempt to minimize the "transference of guilt" resulting from massive trial. What she does contend is

that it was impossible for the judge or the jury to deal with the individuals as individuals given the decision by the prosecutors to gather all of these separate incidents into one indictment. Rule 14 of the Federal Rules of Criminal Procedure gave the Trial Court the tool to use in order to avoid the "transference of guilt" which obviously resulted from the joint trial, yet the Trial Court choose not to use that "tool" in order to require a separate trial on the charges against Amalia Morgado. It was the failure of the Trial Court to order the separate trial which deprived Amalia Morgado of her right to due process in this case, and that deprivation can only be corrected by a reversal of the convictions herein and a new trial on the separate charges alleged against her.

The length of time it took the jury to resolve the issues submitted to it should be recognized as an indication that the massiveness and complexity of the case caused confusion and uncertainty which was only resolved at the expense of the defendant's constitutional rights to separate consideration. The Court of Appeals, in deciding the severance issue, noted that this case raised serious issues concerning the ability of the finder of fact to make discrete determinations of guilt or innocence with respect to the separate defendants. The Court of Appeals commented:

> Notwithstanding the very skillful presiding of the trial judge, appellants argue that the totality of the circumstances were such that jury had to be confused and unable to individualize the verdicts simply because of the volume of evidence which inundated them. We acknowledge the validity of this concern and, were it not for the manner in which Judge Hodges handled this obviously difficult trial

and our review of the verdicts in light of the record, we might be prone to agree with appellants. . . . Although coming close, defendants have not met the burden imposed to compel our finding of an abuse of discretion.

648 F.2d at 386. Petitioner, Amalia Morgado, submits that the rationale used by the Court of Appeals to sustain her conviction in this instance is inappropriate. Rather than relying upon the three and one-half weeks of jury deliberations prior to the rendition of the verdicts to sustain the convictions, the Court of Appeals should have recognized that as a key indicator that the jury was hopelessly confused as to the facts which they were required to decide. Rather than relying upon the split verdicts to sustain the convictions, the Court of Appeals should have recognized that they were the result of confused deliberations concerning complex legal and factual issues. Similar rationalizations expressed by the Court of Appeals in Kotteakos, supra, were rejected by this Court:

> We have had regard also for the fact that the Court of Appeals painstakingly examined the evidence relating directly to each of the petitioners; found it convincing to the point of making guilt manifest; could not find substantial harm or unfairness in the all-pervading error or in any particular phase of the trial; and concluded that reversal would be a miscarriage of justice.
>
> With all deference we disagree with that conclusion and with the ruling that the permeating error did not affect "the substantial rights of the parties." That right, in each instance, was the right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others as shown by this record.

328 U.S. at 775, 66 S. Ct. at 1253.

Amalia Morgado was denied a fair trial as a direct result of the denial of the motion for severance and for a separate trial. The record in this case demonstrates that her constitutional rights have been denied her as a result of the affirmance of the convictions notwithstanding the holding of this Court in Kotteakos, supra, by which authority the conviction should have been reversed. The conflict between the decision of this Court in Kotteakos and the decision of the Court of Appeals in United States v. Martino, supra, can only be resolved by issuing the writ of certiorari requested by the petitioner.

2.

WHETHER PROVISIONS OF THE RICO STATUTE ARE UNCONSTITUTIONALLY VAGUE AS WRITTEN AND APPLIED TO AMALIA MORGADO IN THIS CASE

Under the provisions of Section 1961 of Title 18, United States Code, an "enterprise" is defined as follows:

> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

It is this definition of "enterprise" which is incorporated into the substantive RICO provisions of Section 1962. Petitioner Morgado submits that this definition is unconstitutionally vague and that the convictions for violations of subparts (c) and (d) of Section 1962, predicated as they are upon this definition of "enterprise", must be reversed.

This Court held in Dunn v. United States, 442 U.S. 100, 99 S. Ct. 2190, 2197 (1979), that the courts must decline to impose punishment for actions that are not "plainly and unmistakably"

proscribed by a statute enacted by the legislature. Such action requires the legislature to speak with special clarity when drawing the boundaries of criminal conduct. It is submitted by the petitioner that the attempt by the legislature to define "enterprise" in this instance has run afoul of this teaching; the language chosen does not provide any clarity. It fails to make anything "plain or unmistakable" in this context. While it is true that the evidence adduced at the trial of this case would have supported the submission of an arson charge to the jury with respect to the petitioner, Amalia Morgado, that is not the charge she was confronted with in the court below. There is nothing in the definition of "enterprise" set out above which could possibly have alerted the petitioner to the fact that she could be deemed to be a member of a 23 person enterprise based merely upon her dealings with Willie Noriega which allegedly precipitated two fires.

The RICO statute is void for vagueness because it fails to give the citizens of this country fair notice as to what conduct is considered to be forbidden. The vagueness of the statute encourages arbitrary and erratic charges and convictions, and that is precisely what has occurred in this instance. See Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S. Ct. 839, 843, 31 L. Ed. 200 (1972). "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited." United States v. Cardiff, 344 U.S. 174, 176, 73 S. Ct. 189, 190, 97 L. Ed. 200 (1952). It was not until the indictment was returned in this case that the petitioner realized that she could be considered to be a part of an "enterprise" of 23 individuals which was forbidden by the provisions of Section

1962 by merely (allegedly) engaging in conduct with four of those individuals which, until the decision in this case, was only a violation of state law. This lack of precision in the statute makes the boundary between that which is legal under Federal law and that which is illegal uncertain and unknown. For this reason the petition for the issuance of a writ of certiorari should be granted and this case considered on that ground.

3.

ADOPTION OF QUESTIONS PRESENTED BY THE PETITIONS FOR CERTIORARI FILED BY THE OTHER DEFENDANTS NAMED IN THE INDICTMENT IN THIS CASE

Pursuant to the provisions of Rule 19.3 of the Supreme Court Rules, the petitioner, Amalia Morgado, adopts each and every issue raised and argued by the other defendants in this case where those issues are applicable to this petitioner.

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(813) 223-9395

By: Michael C. Addison

Attorney for Amalia Morgado

Appendix

APPENDIX A

Petitioner, Amalia Morgado, incorporates by reference as Appendix A, Appendix A as filed by Petitioner Joseph D. Lazzara.

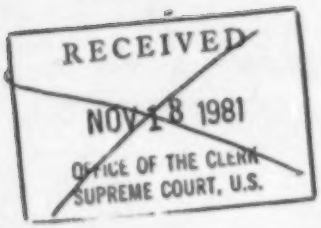
APPENDIX B

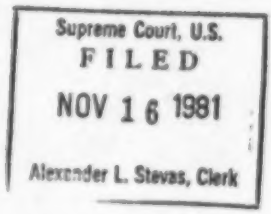
Petitioner, Amalia Morgado, incorporates by reference as Appendix B, Appendix D as filed by Petitioner, Joseph D. Lazzara.

81-5748

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981





AMALIA MORGADO

Petitioner

-vs-

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

AMALIA MORGADO

Petitioner

-vs-

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner Amalia Morgado moves the Court for an order permitting her to proceed in this Court, in forma pauperis, with her Petition for Writ of Certiorari to review the decision of the 5th Circuit Court of Appeals filed on June 19, 1981, in U. S. v. Martino, et al, 648 F.2d 367 (5th Cir. 1981) pursuant to the provisions of 28 U.S.C. §1915 and Rule 46 of the Rules of the Supreme Court.

Petitioner Amalia Morgado is represented by Michael C. Addison, who was appointed counsel by the United States District Court for the Middle District of Florida pursuant to the Criminal Justice Act of 1964, as amended, 18 U.S.C. §3006 and 18 U.S.C.

§3006A. Pursuant to Supreme Court Rule 46, Petitioner is not filing an affidavit with this motion.

Leave to proceed in forma pauperis was sought by Petitioner in the courts below.

Petitioner is entitled to redress by Petition for Writ of Certiorari to the United States Supreme Court, and her petition presents substantial questions. She is seeking relief from her conviction under the RICO statute [18 U.S.C. §1961 et seq.], and the mail fraud statute [18 U.S.C. §1241].

Petitioner's Petition for Writ of Certiorari is being filed with this motion.

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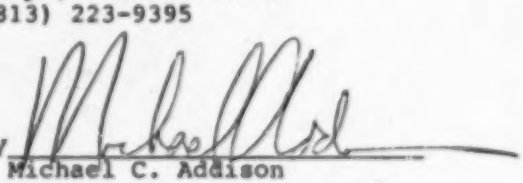
(813) 223-9395

By 
Michael C. Addison

Attorney for Amalia Morgado

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Leave to Proceed In Forma Pauperis was furnished by United States delivery by depositing it in the U. S. Post Office, with first class postage prepaid, addressed to all counsel of record listed below, pursuant to Supreme Court Rule 28, this 16th day of November, 1981.

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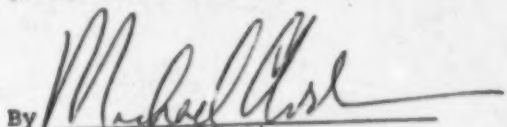
By 
Michael C. Addison